SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 341

ESTATE OF EUGENE L. FREELAND, Deceased, by SECURITY FIRST NATIONAL BANK, a national banking association, Executor, and VERA GOOD FREELAND, by L. N. TURRENTINE, Conservator,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MARGARET C. LOWTHIAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

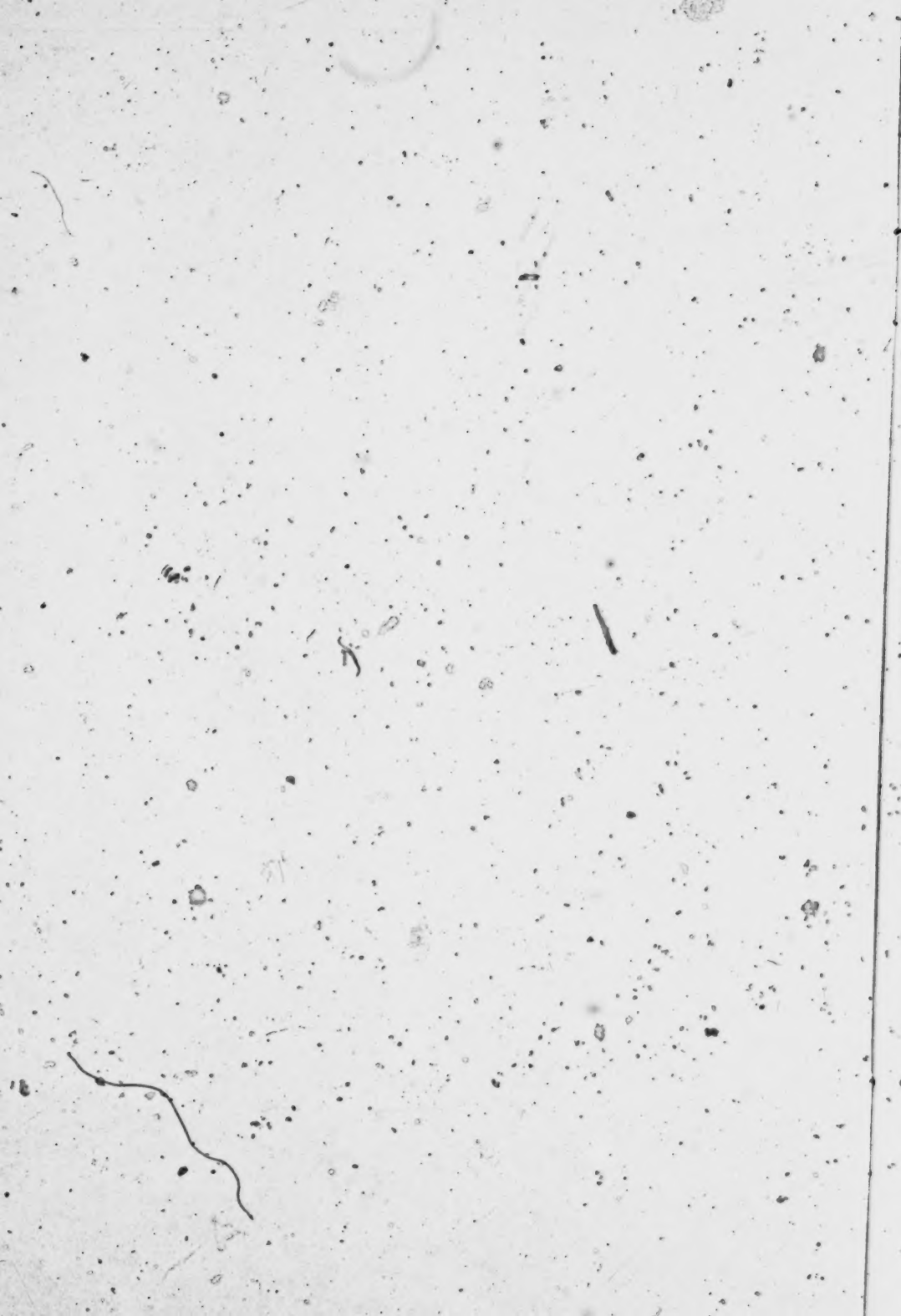
PETITIONERS' REPLY AND SUPPLEMENTAL BRIEF.

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REPLY.

1. Under his point 1, at pp. 4-5, respondent grievously misstates the record. He says that the record "shows no more than a failure of the subdivision enterprise and a desire to liquidate it as evidence of a change in purpose." There was, indeed, "a failure of the subdivision enterprise"; and there was, indeed, "a desire to liquidate it," to liquidate, that is, the *subdivision enterprise.* But that is not all that the record shows. There was also unsubdivided land; and, after Berger's sale of

his interest, on August 10, 1956, the desire of SBIC, the partnership holding the land, was not, except for Berger, to liquidate but to hold. (Pet. App. 34-35.[1]) And there was good reason; the land was in an area of "continuing and substantial appreciation in real estate values." (Pet. App. 5-6.) Clearly if, as respondent contends, SBIC's original purpose was not to hold the land but to subdivide it, then after the failure of LMDC and Berger's agreement to sell his interest in SBIC, the purpose of SBIC, or what was left of SBIC, was no longer to subdivide but to hold.

2. Under his point 2, pp. 5-6, respondent makes reference to the case of *John Kelley Co. v. Commissioner,* 326 U.S. 521. That case, decided in 1946, involving review of Tax Court decisions, applied the limitation on such review which had been established by *Dobson v. Commissioner,* 320 U.S. 489, and had become known as the "Dobson rule." Under that rule review of Tax Court decisions was limited to "clear-cut" questions of law. That limitation, however, was abrogated by Congress in 1948 by a statutory amendment which made the scope of review in the case of Tax Court decisions the same as in the case of decisions of district courts. *United States v. Snyder Bros. Co.* (C.A. 5, 1966), 367 F. 2d 980, 984; P.L. 773, June 25, 1948, 1948-2 C.B. 321; Internal Revenue Code of 1954, sec. 7482.

In the process of adopting that amendment the Dobson rule was severely and lengthily criticized on the floor of Congress. Title 28, United States Code, Congressional Service, 80th Cong., 2d Sess., p. 1986, *et seq.,* especially 1990-1991, 2000, 2005, 2010-2011, 2037-

[1]This refers to the appendix in the petition.

2039. The rule, it was charged, had resulted in "confusion." That was also the effect attributed to it by the dissents in *Kelley, supra.* Justice Rutlege there, at page 533, pointed out especially the destructive effect of the Dobson rule in allowing, on the basis of differences without substance, "squarely conflicting" decisions. In the debates in Congress cited above it was observed, page 1990, that this Court, in *Trust of Bingham v. Commissioner,* 325 U.S. 365, had sought to cure *Dobson* but that in *Kelley, supra,* it had "wiped out its [*Bingham's*] curative effectiveness, and left the Dobson doctrine again supreme." It was no wonder that after *Kelley* Congress so quickly put an end to the Dobson rule.

Respondent here, under his point 2, is obviously misled by the *Kelley* case. The Court of Claims in *Morse* and *Ginsburg*[2] did point out some differences between the case here and the cases there. But only a difference between them as to the time when the change of purpose shown occurred could be a difference of any substance and, as shown in our petition, pages 8-9, the Court of Claims, in *Morse* and *Ginsburg* placed the change of purpose definitely at August 10, 1956, and as shown in our petition, at page 13, and in this reply under point 1 above, the record here is clearly consistent with that date. As far as substance is concerned, therefore, the failure here to recognize the change of purpose by that date is a clear and direct conflict between the case here and the cases there.

Nor is that conflict merely one of fact. As shown at pages 10-11 of the petition herein, the court below in arriving at its conclusion in respect to the purpose of

[2]371 F. 2d 474 and 396 F. 2d 983, respectively.

SBIC in holding the property clearly erred on the quantum of petitioners' burden of proof. Further, because of petitioners' burden of proof it stated that it could not "hold as a matter of law that that purpose [of holding the property] *must* have changed." (Pet. App. 26; italics in original.) As shown in the final paragraph under point 3 below, this in itself was error. Thus we have a conflict of fact induced by a compound of errors of law. The conflict between the court below herein and the Court of Claims in *Morse* and *Ginsburg* is thus clearly not merely one of fact, as respondent here, at page 5, suggests.

3. Under his point 3, at page 6, respondent in effect concedes a clear conflict with decisions of this Court by implying that petitioners must demonstrate, "conclusively," the absence after Berger's sale of a purpose to hold primarily for sale to customers in the ordinary course of trade or business. Petitioners' burden of proof, even if it were not of a negative but of a positive, would never be required to be *conclusive. Burnett v. Niagara Falls Brewing Co.,* 282 U.S. 648, 654, cited by petitioners in their petition, at page 11; *United States v. United States Gypsum Co.,* 333 U.S. 364, 395. Nor is petitioners' burden one to show, as respondent finally suggests, that the evidence "cannot support" the findings actually made; for "when although there is *evidence to support it* [a finding], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," reversal is proper. (Italics supplied.)

United States v. United States Gypsum Co., supra, at pages 395-396.

The cases cited by respondent in that connection, *United States v. National Association of Real Estate Boards,* 339 U.S. 485, 495-496, and *United States v. Yellow Cab Co.,* 338 U.S. 338, 342, are not to the contrary. Indeed, the later of those two cases, *United States v. National Association of Real Estate Boards,* at the pages indicated, being the very pages cited by respondent, cites and relies on *United States v. United States Gypsum Co., supra.*

Just as respondent thus ran counter to decisions of this Court in saying that petitioners failed to prove the required absence of holding for sale to customers "conclusively," and in saying that petitioners failed to show that the evidence "cannot support" the finding to the contrary, so likewise did the court below in saying that it could not "hold as a matter of law that that purpose [of holding the property] *must* have changed." (Pet. App. 26; italics in original.)

4. It is very significant also that respondent has wholly failed to respond to points 3, 4 and 5 of the petition. (Pet. 12-15.) The conflicts shown there between the decision below and decisions of this Court are critical in the law of taxation and reach into the general principles of justice. We urge a restudy of those points.

5. The inconsistency between the decision here below and the result in *Morse* and *Ginsburg* in the

Court of Claims, referred to in point 2 of this reply, is emphasized by respondent's failure also to respond to point 6 of the petition. (Pet. 6-7, 16.) As there shown, the case here was reopened by the Internal Revenue Service "in the interest of being consistent" with the cases which finally were decided in the Court of Claims. As there also shown, the consistency which was thus a matter of such importance to the Internal Revenue Service is lost as a result of the reverse conflict represented by the present posture of the same cases.

The importance of consistency to the Internal Revenue Service is further shown by its present rule on reopening of cases. According to that rule the Internal Revenue Service will not reopen any case to make an adjustment unfavorable to the taxpayer, because of an error involved in the prior closing, unless that error was "a clearly defined substantial error based on an *established* Service position existing at the time of the previous examination." Revenue Procedure 68-28, 1968-33 I.R.B. 41, Sec. 4.01(2). (Italics supplied.) Thus to warrant reopening of a case, as occurred here, error in the prior closing is not enough; the reopening must, in effect, be required by consistency. Consistency is, of course, an element of basic justice, but here, more especially, it is a requirement of Internal Revenue policy. For that reason we raise again the importance of this case.

SUPPLEMENTAL BRIEF.

A further conflict has just resulted because of the decision August 22, 1968, by the United States Court of Appeals for the Tenth Circuit in *Commissioner v. Tri-S Corporation,* 68-2 USTC ¶9541. There the Commissioner appealed from a decision of the Tax Court, 48 T.C. 316, and the Court of Appeals affirmed.

The taxpayer there was a residential land developer. Involved in the case was a particular 20-acre tract. Because of notice by the State of Colorado on April 7, 1961, that it would institute condemnation proceedings to take the tract for highway purposes, the taxpayer entered into negotiations with the State for sale of the tract to it. Agreement was reached on July 25, 1961, and conveyance to the State was completed on October 6, 1961. The Court there stated:

> "During the period from April 7, 1961, to October 6, 1961, it is clear under the facts that the taxpayer was not holding the 20-acre tract primarily for sale to customers in the ordinary course of its trade or business. While prior to April 7, 1961, it had intended at some time in the future to improve the 20-acre tract, so as to render it suitable for a shopping center and to make disposition of it for that purpose, from and after that date it would have been futile for it to have undertaken to carry out such future plans. It clearly did not hold such land for sale to customers in the ordinary course of its trade or business on July 25, 1961, when it agreed to convey the 20-acre tract to the State of Colorado, and on October 6, 1961, when it consummated such conveyance."

In the case here, in addition to other factors supporting petitioners, it is wholly uncontested that after August 10, 1956, and up to the time of the sales involved of petitioners' interests in SBIC, SBIC was just holding the land and was not, either directly or indirectly, developing it, or making any plans to develop it, or offering it for sale, in its raw state or any other state, to customers in the ordinary course of its trade or business. There is absolutely nothing in the findings to the contrary. The conflict with the *Tri-S* case is thus clear and direct.[3]

Conclusion.

Because of the conflicts recited herein, and in our petition, between the decision below and decisions of this and other courts, and because of the importance of this case shown above, we urge again that our petition for a writ of certiorari be granted.

Respectfully submitted,

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Both by GEORGE T. ALTMAN,
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[3]In view of the fact that this supplemental brief presents a conflict with a case which had not yet been decided when the petition herein was filed, petitioners recognize that respondent should have an opportunity to file a response.